IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1355 OF 2006

WITH

WRIT PETITION NO.1356 OF 2006

WITH

WRIT PETITION NO.1357 OF 2006

WITH

WRIT PETITION NO.1358 OF 2006

Vijaykumar M.Hirakhanwala HUF)
through their Karta Mr.Vijaykumar)
M. Hirakhanwala, 312 Kalbadeevi)
Road, 4th Floor, Mumbai - 400 002)..Petitioner.

V/s.

1. Income Tax Officer, 14(2)-4,)
Mumbai, Earnest House, 3rd Flor,)
Nariman Point, Mumbai-21.)
)
2. Commissioner of Income Tax-14)
Earnest, 6th Floor, Nariman)
Point, Mumbai-21.)
)
3. Union of India, through the)
Secretary, Ministry of Finance)
Government of India, North Block)
New Delhi - 110 001.)..Respondents.

Mr.Porus Kaka with A.K. Jasani for petitioner in all the matters.

Mr.S.M.Shah for respondents in all the matters.

CORAM : H.L.GOKHALE AND
J.P.DEVADHAR, JJ.

DATED : 5TH SEPTEMBER, 2006.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. In all these petitions, the petitioners have challenged the notices issued under section 148 of the Income Tax Act, 1961. By the said notices all dated 30th March, 2004, the assessments processed under section 143(1)(a) of the Income Tax Act, 1961 for A.Y. 1997-98, 1999-2000, 2000-2001 and 2002-03 are sought to be reopened.

2. Writ Petition No.1355 of 2006 pertains to A.Y. 1997-98. Writ Petition No.1356 of 2006 pertains to A.Y. 1999-2000. Writ Petition No.1357 pertains to A.Y. 2000-01 and Writ Petition No.1358 pertains to A.Y. 2002-03. Since the reasons for reopening all these assessments are common, all these writ petitions are heard together and disposed of by this common Judgment.

3. Petitioner is a Hindu Undivided Family (hereinafter referred to as ‘the assessee’ for short) and is assessed to tax since the year 1922. The assessee is carrying on the business of cotton ginning and pressing from its four factories located at Jalna Lasur, Deulgaon Raja and Kurduwadi in Maharashtra. The head office of the petitioner is situated at Bombay.

4. The returns of income filed by the assessee for the assessment years in question were processed and accepted under section 143 (1)(a) of the Income Tax Act, 1961. In the said returns of income the assessee as in the past had sought the expenditure incurred at the head office at Bombay to be set off against the other income and the same was allowed on processing the returns of income.

5. By the impugned notices all dated 30th March, 2004, the assessing officer sought to reopen the assessments for the assessment years in question, so as to disallow the loss / expenditure incurred at the administrative office of the petitioner at Bombay. The reasons recorded by the assessing officer for reopening the assessments in all the assessment years in question are more or less similar. The reasons recorded for reopening the assessment for A.Y. 1997-98 are:-

> "In this case, the return of income was filed on 28/10/97 declaring total income of Rs.28,55,120/-. The same was processed u/s. 143 (1) (a) without any variation. During the previous relevant to A.Y. 97-98 assessee was carrying out the business mainly from Jalna Kurduwadi, Devalgaon Raja and Lasur. He has also claimed to have an office at Mumbai. During the course of assessment proceedings for A.Y. 2001-02, it was noticed that there was hardly any activity from the Mumbai office and the loss from the Mumbai office was disallowed.

> During the previous year relevant to A.Y. 1997-98, it is seen from the P&L a/c. for the year ended 31/3/1997 the only income showed by the assessee for A.Y. 1997-98 from Mumbai office was dividend of Rs.26,612 and interest of Rs.35,544/-. As the assessee's claim of loss of Rs.4,14,046/- on account of Mumbai office is not allowable, to that extent there was under assessment in this case. In the circumstances, if approved provisions u/s.147 may be invoked in this case and notice u/s.148 may be issued for A.Y. 1997-98.

6. The petitioner objected to the reopening of the assessments and pointed out that in the past the very same issue relating to the expenditure / loss at the Bombay office has been adjudicated and allowed in the regular assessment orders passed under section 143 (3) of the I.T. Act. It was pointed out that even in A.Y. 2001-02 the disallowance made in respect of the loss / expenditure incurred at the Bombay office has been deleted by C.I.T.(A) on 4/10/2004. However by an order dated 17th March, 2006 the objections filed by the petitioners were rejected by the assessing officer. Hence, these petitions are filed to challenge the notices issued under section 148 of the Income Tax Act, 1961.

7. Mr.Kaka, learned counsel appearing on behalf of the petitioner submitted that the reopening of the assessment on the ground that "there was hardly any activity from Bombay office" is ex-facie erroneous,

incorrect and contrary to the 80 days old record of the petitioner available with the department. He submitted that the issue as to whether the loss incurred by the administrative office at Bombay is allowable or not has been considered in the assessment orders passed under section 143(3) of the Income Tax Act,1961 for several years and, therefore, it is not open to the assessing officer to reopen the assessments on the very same ground.

8. Mr.Kaka referred to the assessment orders passed under section 143(3) for A.Y. 1992-93 and A.Y. 1995-96 wherein the expenditure incurred at the Bombay office has been specifically discussed and allowed. He also referred to the order passed by C.I.T.(A) on 4-10-2004 wherein the disallowance of the expenditure incurred at the Bombay office made by the assessing officer in A.Y.2001-02 has been deleted. Accordingly, Mr.Kaka submitted that in the absence of any material record and merely by way of change of opinion, the concluded assessments cannot be reopened and, therefore, the notices impugned in all these petitions are liable to be quashed and set aside.

9. Mr.Shah, learned counsel appearing on behalf of the respondents submitted that the impugned notices have been issued based on the assessment order passed

in A.Y.2001-02, wherein the expenditure incurred by the assessee at its Bombay office has been disallowed. The fact that the said order has been set aside by the Commissioner of Income Tax (Appeals) subsequently on 4th October, 2004, would not invalidate the notices which were issued under section 148 of the I.T. Act on 30/3/2004. Accordingly, Mr.Shah submitted that on the date on which notices were issued, the assessing officer had reason to believe that the income had escaped assessment. He submitted that the reasons recorded by the assessing officer for reopening the assessments have been approved by the C.I.T. In this view of the matter, he submitted that the reopening of the assessments cannot be faulted and it is open to the petitioner to agitate all the issues before the assessing officer and the same would be considered in accordance with law. Accordingly, Mr.Shah submitted that there is no merit in the petitions and the same are liable to be dismissed.

10. Having considered the rival submissions, we are of the opinion that in the facts of the present case, the notices issued under section 148 of the Income Tax Act, 1961 cannot be sustained for the reasons set out hereafter.

11. Notice under section 148 of the I.T. Act

can be issued for reopening the completed assessment only if the assessing officer has 'reason to believe' that any income chargeable to tax has escaped assessment. The word 'reason to believe' presupposes existence of some material or information based on which a reasonable belief regarding income escaping assessment could be entertained. In the absence of any material or information which prime facie suggests that the income has escaped assessment, the action of the assessing officer in invoking the jurisdiction to reopen the assessment cannot be sustained. The material or the information relied upon by the assessing officer must be real and not vague or imaginary. In other words, the existence of some material or information to show prima facie that the income has escaped assessment is a must before reopening the assessment.

12. In the present case, the facts established and accepted over the years is that the cotton ginning and pressing business of the assessee carried on at its factories located at four places in the State of Maharashtra are controlled and managed by its office at Bombay and that the expenditure / loss incurred by the Bombay office has all through been allowed to be set off against other income of the assessee.

13. The assessments for the years in question are sought to be reopened on the ground that in A.Y. 2001-02 the assessing officer has disallowed such expenditure on the ground that there is "hardly any activity from the Mumbai office". The words ‘hardly any activity’ does not mean that there is no activity carried on at Bombay. It simply means that the business activity carried on from the Bombay office is negligible. The contention of the assessee has always been that the Bombay office is the liasion office and the same has been scrutinised and approved in the regular assessments passed under section 143(3) of the I.T.Act for several assessment years including A.Y.1992-93 and A.Y.1995-96. Therefore, when the expenditure incurred at the Bombay office has been consistently allowed to be deducted for several decades, in the absence of any specific material to show that in the past the said expenditure has been erroneously allowed, the assessing officer could not have reopened the assessments by merely stating that ‘there is hardly any activity from the Mumbai office’.

14. It is true that in A.Y.2001-02, the assessing officer had made disallowance of the expenditure incurred by the assessee from its Bombay office by stating that there is hardly any activity from the Bombay office. However, admittedly, the said

disallowance made by the assessing officer in A.Y. 2001-02 has been set aside by the C.I.T.(A) on 4/10/2004. This fact was brought to the notice of the assessing officer, however, the same has not been accepted on the ground that the order of C.I.T. (A) is subsequent to the date of the issuance of the notice under section 148 of the Act.

15. In our opinion, the reasons recorded that there is 'hardly any activity from the Bombay office' is totally vague and would neither constitute any material or information so as to form nexus or reason to believe that the income has escaped assessment. As stated earlier, for several decades, the expenditure incurred at the Bombay office of the assessee has been consistently allowed in the regular assessments and there is no material on record to show that in the past the expenditure has been erroneously allowed. Thus, in the present case, there is no material or information based on which the assessing officer could form a reasonable belief that the income chargeable to tax has escaped assessment. Therefore, it is evident that the reopening of the assessments are based on pure change of opinion and there is no material whatsoever to constitute any basis for reopening the assessments.

16. We may note that for A.Y. 2002-03 the assessing officer has recorded an additional ground for

reopening the assessment, namely, excess depreciation has been allowed on account of failure to deduct the capital subsidy from the written down value of fixed assets while claiming depreciation. The assessee in its objection to the reopening of the assessment has clearly stated that the capital subsidy received has in fact been deducted from the written down value of fixed assets while claiming depreciation. It appears that the explanation given by the assessee is accepted by the revenue, because, neither in the order rejecting the objections raised by the assessee, nor in the affidavit in reply and not even before this Court, the revenue has pressed the ground for reopening the assessment on account of excess depreciation. Thus, the only ground on which the assessments are sought to be reopened in all the years in question is that the expenditure / loss incurred at the Bombay office cannot be allowed as there is hardly any activity from the Bombay office of the assessee. In our opinion, the reopening of the assessments based on the above ground which is totally vague and devoid of any substance cannot be the basis for reopening the assessments.

17. In the result, all the petitions are allowed by quashing and setting aside the notices all dated 30th March, 2004 issued under section 148 of the Income Tax Act, 1961.

18. Rule is made absolute in the above terms with no order as to costs.

(H.L.GOKHALE, J.)

(J.P.DEVADHAR, J.)